89- 1427

Supreme Court, U.S.
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No.: _____

IN THE

Supreme Court of the United States

October Term, 1989

HERBERT PATE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the sentencing court in view of this Court's decision in Rodriquez v. United States, ____U.S.____, 107 S. Ct. 1351 (1987) improperly imposed consecutive terms of imprisonment on the four 18 U.S.C. Section 3147 Counts?

2. Whether the sentences imposed on the 18 U.S.C. Section 3147 Counts should be vacated because the District Court sentenced Petitioner under a misapprehension that it had to impose a mandatory minimum term and incorrectly informed Petitioner pursuant to Rule 11(c)(1), Federal Rules of Criminal Procedure, of his mandatory minimum.

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PRELIMINARY STATEMENT

This is an appeal by Petitioner, Herbert Pate, from a judgment of the United States Court of Appeals for the Second Circuit, decided July 28, 1988 by summary order, which denied Petitioner's motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure to correct an illegal sentence. A further

appeal was made for a Rehearing with a suggestion for a Rehearing En Banc, but by order dated October 5, 1988, the Circuit denied the petition of Mr. Pate. A motion had been made to the United States District Court for the Eastern District of New York to correct a sentence of United States District Judge Mishler, in which the Court took the position that it was obliged to sentence Petitioner to consecutive terms of imprisonment with regard to each count Petitioner was convicted of that had occurred while he was on bail pursuant to 18 U.S.C. Section 3147.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1251. There is no opinion of the United States Court of Appeals for the Second Circuit, inasmuch as the affirmance was by summary order.

STATUTE INVOLVED

18 U.S.C., Section 3147 Penalty for an offense committed while on release

A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to --

(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or

(2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed pursuant to this chapter shall be consecutive to any other sentence of imprisonment.

FACTS

On September 8, 1986, Herbert Pate pleaded guilty to a six count information charging him with tax evasion and defrauding an insurance company through wire communications. Initially he was on bail on a 18 U.S.C. Section 1001 charge alleging that he made a false statement to the Parole Board regarding his financial assets and a search was made of two homes owned by Mr. Pate, one in New York and one in upstate New York,

and a firearm was found at each location. He was, thus, charged with possession of a firearm while on bail and having an unregistered weapon while on bail with regard to each location. Thus, when Mr. Pate pleaded guilty to the evasion and fraud counts he also pleaded guilty to the counts involving the firearms. He had been charged with the Section 1001 violation but that was dropped as part of the plea bargain. The counts involving the firearms arose as a result of the search of his homes. Therefore, Mr. Pate was convicted of a total of six counts, the last four of which involved the enhancement provisions of 18 U.S. C. Section 3147, and the Court, after sentencing Pate to one year on Count One, the evasion count, and one year concurrent on Count Two, the fraud count, took the position that the next four counts required it to impose at least two years on each of the four counts, in that each two year sentence would run consecutive to each other. Thus, on Count Three

Mr. Pate got two years consecutive to Counts One and Two; on Count Four he got another three years consecutive. The net result was that for the basic criminal charges, the evasion and the fraud, Pate received one year on each count to be served concurrent with each other, but because of the District Court's misapplication of 18 U.S.C. Section 3147, Pate ended up with a total of twelve years in prison. The District Court relied on the interpretation of the enhancement statute which had been rendered in an opinion of the United States Court of Appeals for the Second Circuit in United States v. Rodriquez, 794 F.2d 25 (2d Cir. 1986). Thereafter, this Court reversed the Second Circuit in that same case of Rodriquez v. United States, ___U.S.___, 107 S.Ct. 1351 (1987), which it held that a trial court or a sentencing court was not obligated to impose consecutive sentences regarding 18 U.S.C. Section 3147.

Petitioner Pate was sentenced by the Trial Court based upon an opinion which later was held by this Court to be erroneous. A motion was made to correct the sentence and the District Court denied it, The Circuit Court thereafter affirmed and denied the petition for Rehearing with the suggestion for Rehearing En Banc.

At the plea colloquy and later at the sentence the District Court stated its belief that 18 U.S.C. Section 3147 required enhanced consecutive sentences for each of the four crimes committed while on bail rather than a single enhancement under Section 3147 to run consecutive to the sentences imposed for the substantive crimes (Sentence Minutes, November 6, 1986, Pages 7-15). The District Court stated:

> "[O]n counts three, four, five and six ... there were minimum terms of two years and that all the terms of imprisonment imposed must be consecutive to any other sentence of imprisonment ...

> As I view it, that means for those four sentences, that each sentence must be consecutive to every other sentence I impose and the sentence on each of the crimes must be for not less than two years."

Following its view that 18 U.S.C. Section 3147 provided for consecutive enhanced sentences, the Court imposed the following prison terms:

> Count One - one year
> Count Two - one year to run concurrently with the term imposed in Count One.
> Count Three - two years, consecutive to the terms imposed in Counts One and Two.
> Count Four - three years, consecutive to the terms imposed in Counts One, Two and Three.
> Count Five - three years, consecutive to the terms imposed in Counts One, Two, Three and Four.
> Count Six - three years, consecutive to the terms imposed in Counts One, Two, Three, Four and Five.

Subsequently, Petitioner challenged his sentence arguing that Section 3147 did not provide for consecutive enhanced sentences. In its Memorandum of Decision and Order, the District Court dealt with this claim in rather

summary fashion -- it was denied without the benefit of either citation or analysis. The totality of the District Court's reasoning on this issue encompassed no more than a sentence:

> "[D]efendant argues that Section 3147 only requires that the Court impose one enhanced Section 3147 sentence to run consecutive to any other sentences that may be imposed for the substantive crimes . . . We find that the clear and unambiguous language of the statute contradicts defendant's argument that Section 3147 requires the Court to impose only one enhanced sentence. Thus, we find defendant's second argument is without merit."

During the oral argument on appeal, the panel recognized the necessity of resolving this important issue, one of first impression in the country. However, it apparently declined to do so for the reason that in only one count, Count Five, did the use of the enhancement in this case result in a sentence exceeding the maximum term of imprisonment otherwise provided. Indeed, during the argument, the Court specifically requested counsel

to inform it by letter of any sentences imposed on Petitioner which exceeded the maximum term otherwise provided by virtue of the enhancement contained in Section 3147. Thus, the panel believed that the issue did not warrant a resolution since, on all but Count Five, the sentence the District Court imposed was shorter than the maximum sentence could have been imposed without applying the enhancement contained in Section 3147.

This issue will raise itself time and again in all prosecutions where the defendant is convicted of at least two counts which are enhanced by Section 3147. Indeed, even though Section 3147 was amended, effective November 1, 1987, by deleting mandatory minimum terms of imprisonment (see 18 U.S.C. Section 3147 (West 1985 and Supp. 1988), the issue of whether an individual convicted of two or more counts enhanced by Section 3147 receives a single enhancement, or multiple enhancements to be consecutively served, remains, and thus

needs resolution.

The sentencing and District Court clearly was confused, and even doubted whether or not two year enhanced consecutive sentences on each of the four counts was fair. The Court said:

> "THE COURT: Before I go on to the sentencing, I don't know whether at the time of sentencing or time of the plea proceeding I advised Mr. Pate that on Counts Three, Four, Five and Six that there were minimum terms of two years and that all the terms of imprisonment imposed must be consecutive to any other sentence of imprisonment . . .
>
> MR. SHARGEL: Well, Judge Mishler, I think that the case that I read holds that it would be one two year sentence to run consecutive. But in all events, I think that Mr. O'Connell and I agree and I think that the plea agreement provides that the maximum or cap that was put on the sentence is all enveloping . . .
>
> THE COURT: As I view it, that means for those four sentences, that each sentence must be consecutive to every other sentence I impose and the sentence on each of the crimes must be for not less than two years . . .
>
> That's right. No, the cap is twenty years. I understand that. But I am

more concerned about the understanding of what the minimum sentences are and particularly the consecutive minimum sentences. You interpret it as meaning that all of the minimum sentences can be interpreted as two years. For these purposes, at least, I don't agree with you.

For these purposes, at least, I want you to consider that the parole commission and maybe ultimately the courts will decide differently and say in this case as to each sentence it is implied to serve two years consecutive.

MR. SHARGEL: May I have five minutes?

THE COURT: I frankly say I am puzzled by how it will work out.

MR. SHARGEL: We are in unchartered water . . .

MR. O'CONNEL: Your Honor, just while we are on this subject and before they begin discussing it among themselves, I would just like to point out that the Government's position in construing this provision is consistent with Your Honor's analysis.

THE COURT: Well, we could both be wrong. (Sent. Tr. of November 6, 1986 at Pages 7-14)

Thus, even the District Court recognized that Section 3147 was ambiguous because it failed to express clearly whether multiple

counts alleging a violation of Section 3147 require consecutive sentences to each other or whether it was the intent of Congress to require one enhanced sentence consecutive to the basic underlying crime charged.

POINT I

IT WAS A DENIAL OF DUE PROCESS TO DENY PETITIONER'S MOTION TO CORRECT HIS ILLEGAL SENTENCE. THE COURT WAS UNDER THE MISAPPREHENSION THAT IT HAD TO IMPOSE CONSECUTIVE SENTENCES OF ENHANCEMENT PURSUANT TO SECTION 3147.

When the sentencing court imposed the consecutive sentences on each count of the information herein it was unsure of the law but was following a decision of the United States Court of Appeals for the Second Circuit which interpreted Section 3147, United States v. Rodriquez, 794 F.2d 24 (Decided June 19, 1986 - 2d. Cir. 1986) The Court followed that decision, indicating that it would have been prevented from suspending sentence or imposing probation and that it was required to impose a two year mandatory minimum. About nine months later, however, this Court reversed the Rodriquez case in Rodriquez v. United States, ____U.S.

___, 107 S.Ct. 1351 (1987), and indicated that the Second Circuit was wrong in its interpretation of the statute. This Court held that since Section 3147 did not explicitly divest sentencing judges of their authority and since repeals by implication were not favored, that a sentencing court still had authority to suspend execution of sentences until Congress made its intent clear and manifest. Thus, the Circuit Court erred and Judge Mishler's reliance on the Circuit Court's opinion was misplaced.

While no one can criticize a District Court Judge for relying on an opinion of an appellate court in his district, still a defendant should not suffer when the opinion relied on is wrong. The situation that should exist is that the case should be treated as if the Second Circuit opinion never existed and a defendant should get the benefit of any law change in his favor. Just as Courts have recognized

lenity where ambiguity in the case of penal statutes could be reversed in favor of a defendant, Bell v. United States, 349 U.S. 981 (1955), so, too, when a law change or a clarification of the law takes place in favor of leniency toward a defendant, the defendant should get that benefit. The Second Circuit in this case did not reach the issue because on argument they were only concerned with whether or not the terms of the sentences imposed exceeded the maximum terms that could have been imposed on the two substantive counts, But that begs the issue, since the District Court did not impose maximum terms on the substantive counts. It was clearly the Court's intention not to saddle the Petitioner with the greatest sentence possible.

After this Court's decision in Rodriquez, other Courts have further

expanded the sentencing court's authority under the enhancement section. For example, in United States v. Mudd, 817 F.2d 840 (D.C. Cir. 1987), it was held that probation was an available option for a District Court sentencing under the enhancement statute.

It is argued that where a sentence has been premised upon a major misunderstanding by the sentencing judge as to the legal bounds of his authority, such a sentence is illegal. United States v. DiRusso, 535 F.2d 673, 674 (1st Cir. 1976) Sentences based upon erroneous material and assumptions violate due process. United States v. Darby, 744 F.2d 1508, 1532 (11th Cir. 1984), cert. denied sub nom Calise v. United States, 471 U.S. 1100 (1985) See also United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976). Thus, in cases such as the one at bar, where "the District Court may have relied on misinformation ...

the sentence should be vacated." United States v. Stewart, 779 F.2d 538, 541 (9th Cir. 1985).

In United States v. Lewis, 392 F.2d 440 (4th Cir. 1968), the District Court sentenced a defendant under the mistaken impression that 17 U.S.C. Section 4208(a)(2) required the imposition of the maximum term which could lawfully be applied. In vacating that sentence, the Fourth Circuit states:

> "A defendant is entitled to the unfettered and unset deliberation of the Judge . . . Our decision does not obtrude on the District Judge's discretion; to the contrary, it restores it. The result permits the broad judgment typically vested in sentencing judges. Moreover, as one court has said 'Broad as his discretion may be, a sentencing judge must always conform with the law governing the sentencing function.' Coleman v. United States, 123 U.S.App.D.C. 103, 357 F.2d 563, 570 (1965)."

See Robinson v. United States, 313 F.2d 817, 821 (7th Cir. 1963).

Similarly, numerous sentences have been vacated where the sentencing court relied on a misapprehension of:

(1) Parole Commission rules, see, e.g. United States v. Ruster, 712 F.2d 409 (9th Cir. 1983) (court misunderstood defendant's eligibility for parole by 12 months); United States v. DeMier, 520 F.Supp. 1160 (W.D. Mo. 1981), aff'd. 571 F.2d 1200 (9th Cir. 1982) (court misunderstood defendant's non-eligibility for parole;

(2) the facts stated in a pre-sentence report, see, e.g., United States v. Williams, 668 F.2d 1064 (9th Cir. 1972); United States v. Robin, supra, 545 F.2d 775 (2d Cir. 1976); or

(3) the possibility of parole, see, e.g. United States v. Stewart, 779 F.2d 538 (9th Cir. 1985) (court misunderstood the unavailability of parole for a lifetime sentence under 21 U.S.C. Section 848(a)(1) due to government's erroneous advice).

Thus, it follows that, where as here, the District Court pronounced sentence under the misapprehension that it had to impose a two year mir um enhanced term, the illegal sentences should be vacated.

The sentences imposed under 18 U.S.C. Section 3147 must also be vacated because as a result of this misunderstanding, Herbert Pate was not properly informed of "the mandatory minimum penalty provided by law, if any ..." Rule 11(c)(1), Federal Rules of Criminal Procedure with regard to federal defendants, "Rule 11's concern about sentencing minimums refers only to . . . the lowest sentence the judge is permitted to impose." Hunter v. Fogg, 616 F.2d 55, (2d Cir. 1980), and, as such, requires "informing a defendant of a mandatory minimum sentence." Hill v. Lockhart, 731 F.2d 568, 571 (8th Cir.1984), aff'd, 106 S.Ct. 366 (1985); Hick v. Oliver, 523 F.Supp. 64, 67-68 (D.Kan. 1981). Thus,

the rule embodies the notion that since this information is of "extreme importance to the defendant", Horsley v. United States, 583 F.2d 670, 675 (3rd Cir. 1978), the:

> "defendant must be made aware of the outer limits of punishment. At the very least, this means that he must be apprised of the period of required incarceration. Except for capital punishment, no other consequence can be as significant to an accused as the period of possible confinement."

Quoting United States v. Berry, 412 F.2d 189, 192 (3rd Cir. 1969).

Here, since Herbert Pate was misinformed about the lowest sentence the court below was permitted to impose under Section 3147, those sentences should be vacated.

As we mentioned before, the sentencing court expressed hesitancy in imposing the consecutive enhanced sentences.

> "THE COURT: Before I go on to the sentencing, I don't know whether at the time of sentencing or time of the plea proceeding I advised

Mr. Pate that on counts Three, Four, Fixe and Six that there were minimum terms of two years and that all the terms of imprisonment imposed must be consecutive to any other sentence of imprisonment . . .

MR. SHARGEL: Well, Judge Mishler, I think that the case that I read holds that it would be one two year sentence to run consecutive. But in all events, I think that Mr. O'Connell and I agree and I think that the plea agreement provides that the maximum or cap that was put on the sentence is all enveloping . . .

THE COURT: As I view it, that means for those four sentences, that each sentence must be consecutive to every other sentence I impose and the sentence on each of the crimes must be for not less than two years . . .

That's right. No the cap is twenty years. I understand that. But I am more concerned about the understanding of what the minimum sentences are and particularly the consecutive minimum sentences. You interpret it as meaning that all of the minimum sentences can be interpreted as two years. For these purposes, at least, I don't agree with you.

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> maybe ultimately the courts will decide differently and say in this case as to each sentence, it is implied to serve two years consecutively.
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> MR. SHARGEL: We are in unchartered water . . .
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> MR. O'CONNELL: Your Honor, just while we are on this subject and before they begin discussing it among themselves, I would just like to point out that the Government's position in construing this provision is consistent with Your Honor's analysis.
>
> THE COURT: Well, we could both be wrong.

(Sent. Tr. of 11/6/86 at Pages 7-14).

The lower court recognized that Section 3147 is ambiguous to the extent it fails to express whether multiple counts alleging Section 3147 are to run consecutive to each other, or are to result in one enhanced sentence which is to run "consecutive to any other sentence of imprisonment." 18 U.S.C. Section 3147. As will be shown below,

the language of the statute, its legislative history, and the rule of lenity dictate that Section 3147 provides for a single enhancement to run consecutively to those sentences imposed for other offenses.

The language at issue herein provides:

> A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

18 U.S.C. Section 3147 (emphasis supplied). On its face, the language, "A term of imprisonment imposed under this section shall be consecutive to ... any other sentence[s]", id., presumes other sentences are being imposed under other sections. Indeed, the language clearly states that "[a] term" shall be consecutive to "any other sentence," and not that "[a] term" shall be consecutive to any other term. Had Congress intended to provide for consecutive Section 3147 terms it easily could have done so. Thus, Congress could have provided that:

> A term of imprisonment imposed under this section shall be consecutive to other terms imposed under this section and any other sentence of imprisonment.

The legislative history also supports Petitioner's conclusion. The reports of the Senate and the House Judiciary Committees make it clear that a single enhancement under Section 3147 was intended:

> Section 3147 is designed to deter those who would pose a risk to community safety by committing another offense when released under the provisions of this title and to punish those who indeed are convicted of another offense . . . Accordingly, this section prescribes a penalty in addition to any sentence ordered for the offense for which the defendant was on release. This additional penalty is a term of imprisonment of at least two years and not more than ten if the offense committed while on release is a felony. If the offense committed while on release is a misdemeanor, this additional penalty is at least 90 days and not more than one year. S. Rep. No. 147 at 61. Accord, H. Rep. No. 1121, 98th Cong., 2d Sess. 30-31 (1984); S. Rep. No. 98 225, 98th Cong., 1st Sess. 34 (1983), reprinted in 4 U.S. Code Cong. & Ad. News 3184 (1984).

United States v. Rodriquez, 794 F.2d 24-27 (2d. Cir. 1986), rev'd, ____U.S.____, 107 S.Ct. 1391 (1987) (Emphasis supplied)

Similarly, the Senate, in examining the budgetary impact of Section 3147, stated:

> If an individual is convicted of committing an offense while on release, the bill requires that the individual be imprisoned for an additional period of time, the length of which varies with the seriousness of the offense. S. Rep. No. 147 at 65, 66-67. See also H. Rep. No. 1121, 98th Cong., 2d Sess., 33, 35 (1984); S. Rep. No. 225, 98th Cong. ,1st Sess., 417 (1983), reprinted in 4 U.S. Code Cong. & Ad. News 3182 (1984); S. Rep. No. 317, 97th Cong., 2d Sess. 58, 70 (1982).

Moreover, it is noteworthy that Section 3147 has been applied in a manner identical to that Petitioner suggests. In United States v. Mesa, 641 F.Supp. 796 (S.D. Fla. 1986), the defendant was convicted under a multi-count indictment of committing violations of 21 U.S.C. Sections 848(a)(1) and 846 while released on bail prior to his sentencing on a guilty plea. While the court sentenced the defendant to two five-year consecutive sentences on the narcotics counts, it imposed a single

enhancement pursuant to Section 3147.

We also point out that in a recent decision the District Court in Maine agreed with Petitioner's interpretation of the law regarding sentence enhancement. In United States v. Deneuve, 708 F.Supp. 425 (D.Me. 1989), a case decided in March, 1989, Chief District Judge Cyr analyzed Section 3147 and decided that the legislative history compelled two pertinent conclusions concerning that Section. First, he held that the enhancement statute required additional prison time to the term of imprisonment imposed concerning the offense for which the defendant was released. Secondly, the Court decided that an enhanced sentence under Section 3147 is not required to be consecutive to any other sentence of imprisonment except for the offense for which the defendant was on release. Thus, the Court clearly concluded that multiple terms of imprisonment or sentences with regard to the

offense committed while the defendant was on release could be concurrent with each other, a position taken by Petitioner in the Court below and advanced on this proceeding. It seems unfair for the Petitioner to be saddled with all of the extra time regarding the various enhanced sentences imposed upon him. When one considers the fact that if he were to come before District Judge Mishler now to be sentenced there would probably be no doubt in Judge Mishler's mind regarding the interpretation of the enhancement statute, and he would have received much less of a jail sentence.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- X

UNITED STATES OF AMERICA,

-against-

HERBERT PATE,

Defendant.

CR 86-00415

Memorandum of Decision and Order

- X

February 16, 1988

A P P E A R A N C E S :

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MISHLER, District Judge

On September 8, 1986, defendant Herbert Pate pled guilty to six counts of a superceding information charging:

(1) evasion of income taxes for the calendar year 1983 (26 U.S.C. Section 7201);

(2) devising a scheme and artifice to defraud the Federal Insurance Company (18 U.S.C. Section 1343);

(3) possessing a firearm (a Browning 9 mm pistol) on or about May 28, 1986 while released on bail having previously been convicted of felonies (18 U.S.C. App. II, Section 1202(a)(1) and 18 U.S.C. Section 3147;

(4) possessing a firearm (a silencer) on or about May 28, 1986, while released on bail, which silencer was not registered in the National Firearms Registration and Transfer Record (18 U.S.C. Section 5861(d) and 5871 and 18 U.S.C. Section 3147);

(5) possessing a firearm (a .45 caliber semi-automotic rifle) on or about May 28, 1986, while released on bail (18 U.S.C. App. II, Section 1202(a)(1) and 18 U.S.C. Section 3147;

(6) storing and concealing expolsive material (12 U.S. Militarv M-7 non-electric blasting caps) on May 28, 1986 while released on bail. (18 U.S.C. Sections 842(h), 844(a) and 18 U.S.C. Section 3147).

Prior to sentencing the court advised the defendant "that on counts three, four, five and six . . . there were minimum terms of two years and that all the terms of imprisonment must be consecutive to any other sentence or

imprisonment." (Transcript at 7). "As I view it, that means for those four sentences, that each sentence must be consecutive to every other sentence I impose and the sentence on each of the crimes must be for not less than two years." (Transcript at 10-11).

In response to Gerald L. Shargel, Esq., defendant's attorney's statement, that in his discussions with the defendant the plea agreement provided for a total maximum term of imprisonment of 25 years, the court explained its desire to avoid any confusion with the probability of early release on parole. The court said that the defendant may be thinking that he "may only have to serve a year or two. I am saying to him in making this offer of a plea, the way I interpret it, the section (Section 3147) forget about getting out in two years, or four years or six years or eight years. Because they (the Parole Commission) may very well interpret the section as meaning that each term just be served separately for

at least two years and each sentence consecutive to each other." (Transcript at 12.)

The court imposed the following prison terms: [1]/

Count One	-	1 year
Count Two	-	1 year to run concurrently with the term imposed in Count One.
Count Three	-	2 years - consecutive to the terms imposed in Counts One and Two.
Count Four	-	3 years - consecutive to the terms imposed in Counts One, Two and Three.
Count Five	-	3 years - consecutive to the terms imposed in Counts One, Two, Three and Four.
Count Six	-	3 years - consecutive to the terms imposed in Counts One, Two, Three, Four and Five.

The court imposed prison terms totalling 12 years, or 11 years, of the three year terms imposed under Counts Four, Five and Six may be considered the mandatory minimum for parole purposes.

Defendant now moves pursuant to Fed. R. Crim. P. 35(a) to vacate the sentence imposed in Counts Three, Four, Five and Six on the ground that they were illegally imposed. "[T]he Court pronounced sentence under the misapprehension that it had to impose a two year minimum enhanced term. . . . " (Defendant's Memorandum at 5).

DISCUSSION

The defendant claims that the sentences imposed in Counts Three, Four, Five and Six must be vacated because the court, in sentencing defendant understood that 18 U.S.C. Section 3147 required the imposition of a mandatory minimum term of two years. Defendant claims that in light of the Supreme Court opinion in Rodriquez he was misinformed about the lowest sentence the court could impose under Section 3147 and therefore the sentence should be vacated.

As a second ground for resentencing, defendant claims that Section 3147 only requires

that the court impose a single enhanced sentence for Counts Three, Four, Five and Six rather than four separate Section 3147 terms. Finally defendant asserts that Counts Three and Five constitute a single offense and that the court's imposition of consecutive sentences for these counts was improper.

I. Rodriquez Does Not Require That Defendant's Sentence Be Vacated

Because the motion is based in part on a claim of misconception of the authority of the court, we deem it proper to reveal the considerations of the court as to the appropriate sentence to impose on the defendant. In accordance with the practice and procedure in this district in which a sentencing panel of two judges offers an advisory opinion of the appropriate sentence, we tentatively considered the following sentence:

Count One	-	2 years ± $10,000 fine.
Count Two	-	1 years ± $ 1,000 fine.
Count Three	-	2 years ± $250,000 fine.
Count Four	-	3 years ± $250,000 fine.
Count Five	-	3 years ± $250,000 fine.
Count Six	-	3 years ± $250,000 fine.

All the prison terms to be served consecutively for a total of 15 years. The fines cumulative in the amount of $1,011,000. Assessment of $300 pursuant to 18 U.S.C. Section 3012. [2]/

At the time of sentenceing, November 6, 1986, this court was bound by the Second Circuit Court of Appeals' interpretation of 18 U.S.C. Section 3147 as rendered in United States v. Rodriquez, 794 F.2d 24 (2d Cir. 1986) (decided June 19, 1986). In vacating a sentence which granted probation under Section 3147, the Second Circuit Court of Appeals held that under 18 U.S.C. Section 3147 a two year minimum term was mandated; the Circuit Court directed the district judge to resentence the defendant. Certiorari was granted in the case. The Supreme Court in United States v. Rodriquez, __U.S.__, 107 S.Ct. 1391 (1987) reversed the Second Circuit and held that although Section 3147 required

that a defendant be sentenced to a minimum term of two years the section did not withdraw the sentencing judge's authority to "suspend the imposition or execution of sentence and place the defendant on probation. . . . " 18 U.S.C. Section 3651.

In United States v. Mudd, 817 F.2d 840 (D.C. Cir. 1987) the District Court sentenced the defendant to a prison term of two years believing that under Section 3147 a mimimun term of two years was mandatory. The case came up for review before the D.C. Circuit Court of Appeals following the Supreme Court decision in Rodriquez. The Circuit Court found that the reasoning in Rodriquez gave the sentencing judge the right to consider early parole in sentencing under 18 U.S.C. Section 4205(b) (Repealed, Effective November 1, 1987). The court did not vacate the sentence imposed but simply remanded "the case to allow the district court to consider the appropriateness of probation or early parole." Id. at 844.

In United States v. Patterson, 820 F.2d 1524 (9th Cir. 1987), the defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. App. Section 1202(a). The district judge sentenced Patterson to six months under Section 1202(a) and enhanced the punishment by adding two years pursuant to Section 3147 because Patterson committed the firearm offense while he was released on bail pending appeal on prior felony convictions. The court held "that 18 U.S.C. Section 3147 does not create a separate offense. Section 3147 is a sentence enhancement statute which simply mandates an enhanced sentence for someone who commits an offense while released on bail." Id. at 1526. Here again the Circuit Court did not vacate the sentence; nor did it remand the case to the district court. The Circuit Court affirmed.

Accordingly, we find that the sentencing in this matter was proper and that we are not required in light of the Court's decision in

Rodriquez to vacate the sentencing imposed. The aggregate sentence was one within our discretion. It was not imposed solely in consideration of our interpretation of Section 3147 and the sanctions mandated by the statute.

In addition, the court advised the defendant of the harshest result possible under his plea in considering release on parole. The court's statement, "Forget getting out in two years, four years, or six years or eight years. Because they (the Parole Commission) may very well interpret the section as meaning each crime must be served separately at least two years and each sentence consecutive to each other." We do not have before us the issue of the date that Pate becomes eligible for release on parole under the sentences imposed.

II. Section 3147 Requires That Each Sentence Term be Enhanced

Defendant challenges the authority of the court to impose consecutive Section 3147

enhancement sentences in Counts Three, Four, Five and Six. The argument appears to be that, in imposing the consecutive sentences, the minimum terms required under Section 3147 could not be considered a total mandatory minimum term of eight years (or eleven years, if the three year terms imposed under Counts Four, Five and Six are considered to be mandatory minimum terms for parole purposes) thereby denying Pate eligibility for release on parole until after service of one-third of the term imposed, i.e, four years. Rather, defendant argues that Section 3147 only requires that the court impose one enhanced Section 3147 sentence to run consecutive to any other sentences that may be imposed for the substantative crimes.

Section 3147 of Title 18 of the United States Code states:

> [a] person convicted of an offense committed while released under this chapter . . . shall be sentenced, in addition to the sentence prescribed for the offense, to --

> (1) a term of imprisonment of not less than two years . . . if the offense is a felony . . . .

We find that the clear and unambiguous language of the statute contradicts defendant's argument that Section 3147 requires the court to impose only one enhanced sentence. Thus, we find defendant's second argument is without merit.

III. Counts Three and Five Constitute Separate Offenses

Finally, Pate argues that the consecutive sentences imposed on Counts Three and Five should be vacated because the offenses charged constitute only one offense. (Defendant's Memorandum of Law at 15). We find that Pate's possession of firearms at separate residences constitute separate possessions for purposes of 18 U.S.C. App. Section 1202(a)(1) and that the court properly imposed consecutive sentences for these two distinct offenses.

CONCLUSION

We have reconsidered the sentences imposed with the clear understanding that probation

was a permissible alternative under Section 3147 and the possibility that Pate may not be eligible for release on parole until he shall have served eleven years of his sentence. On reconsideration, the motion is in all respects denied, and it is

SO ORDERED.

JACOB MISHLER
U.S.D.J.

FOOTNOTES

1/ In addition, the court imposed fines totalling $411,000 and assessments under 18 U.S.C. Section 3013 totalling $300.

2/ Under the practice employed in this district in the use of a sentencing panel, the sentencing judge first notes his or her tentative sentence. The two advisory judges then submit their suggested sentence. One judge recommended "15 years plus $500,000 fine, the other judge recommended "Plea Agreement 20 years and maximum fines."

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 28th day of July, one thousand nine hundred and eighty-eight.

PRESENT:

HON. FRANK X. ALTIMARI
HON. J. DANIEL MAHONEY,
Circuit Judges
HON. EDWARD R. KORMAN,
District Judge.*

- X

UNITED STATES OF AMERICA,

Appellee,

-v-

88-1097

HERBERT PATE,

Defendant-Appellant.

- X

Appeal from the United States District Court for the Eastern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

*Hon. Edward R. Korman, District Judge, United States District Court for the Eastern District of New York, sitting by designation.

IN CONSIDERATION WHEREOF, it is hereby ordered, adjudged and decreed that the judgment appealed from is AFFIRMED.

Appellant appeals from an order denying his motion pursuant to Fed. R. Crim. P. 35(a) to correct an illegal sentence entered in the United States District Court for the Eastern District of New York (Mishler, J.). Having considered the arguments of counsel in light of the transcript of record, we affirm the order of the district court for substantially the reasons set forth in Judge Mishler's opinion.

HON. FRANK X. ALTIMARI

HON. J. DANIEL MAHONEY
Circuit Judges

HON. EDWARD R. KORMAN,
District Judge.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fifth day of October, one thousand nine hundred and eighty-eight.

- - - - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA,

Appellee,

v

DOCKET NUMBER
88-1097

HERBERT PATE,

Appellant.

- - - - - - - - - - - - - - - - - -

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

Supreme Court, U.S.
FILED
JUL 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-1427

In the Supreme Court of the United States

OCTOBER TERM, 1990

HERBERT PATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's sentence must be vacated in light of *Rodriguez* v. *United States*, 480 U.S. 522 (1987).

2. Whether the district court, in accepting petitioner's guilty plea, correctly informed him of the mandatory minimum sentence.

3. Whether the district court properly imposed separate consecutive sentences under 18 U.S.C. 3147 for each offense committed while petitioner was released on bail.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1427

HERBERT PATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 14A-15A) is unpublished, but the decision is noted at 856 F.2d 181 (Table). The opinion of the district court (Pet. App. 1A-13A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1988. A petition for rehearing was denied on October 5, 1988. Pet. App. 16A. The petition for a writ of certiorari was filed on February 5, 1990, and is therefore 13 months out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of New York to charges of income tax evasion, in violation of 26 U.S.C. 7201 (Count 1); wire fraud, in violation of 18 U.S.C. 1343 (Count 2); possession of firearms following conviction of a felony and while released on bail, in violation of 18 U.S.C. App. 1202(a)(l) (1982) and 18 U.S.C. 3147 (Supp. II 1984) (Counts 3 and 5); possession of an unregistered firearm following conviction of a felony and while released on bail, in violation of 26 U.S.C. 5861(d) and 18 U.S.C. 3147 (Count 4); and storing and concealing explosives following conviction of a felony and while released on bail, in violation of 18 U.S.C. 842(h) and 18 U.S.C. 3147 (Count 6). He was sentenced to a total of 12 years' imprisonment and fined $411,000. Thereafter, petitioner filed a motion to correct an illegal sentence under Fed. R. Crim. P. 35(a). The district court denied the motion, Pet. App. 1A-13A, and the court of appeals affirmed, Pet. App. 14A-15A.

1. In August 1985, petitioner, a convicted felon, was indicted for making a false statement to a probation officer, in violation of 18 U.S.C. 1001. In May 1986, while the charges against petitioner were pending and petitioner was free on bail, law enforcement officers executed search warrants at two houses owned by petitioner. At the first house, the officers seized financial records evidencing tax evasion. In addition, they seized substances used to "cut" illegal narcotics and more than 20 firearms, including a loaded pistol and a silencer. At the second residence, a mansion located on a 300-acre estate in Greene County, New York, officers seized additional documents evidencing petitioner's tax evasion and numerous firearms and explosives, including two anti-personnel mines. Some of the firearms and explosives were concealed in an underground vault accessible only by a concealed elevator. Gov't C.A. Br. 3.

In June 1986, petitioner was charged in a 31-count indictment with various offenses uncovered as a result of the searches. After lengthy plea negotiations, petitioner pleaded guilty to six offenses charged in a superseding information, including four counts of illegal possession of weapons and explosives while released on bail. Under the terms of the plea bargain, petitioner faced a maximum sentence of 20 years' imprisonment, and a maximum fine of $1.1 million. Gov't C.A. Br. 4.

In November 1986, at the hearing on petitioner's guilty plea, the district court advised petitioner of the maximum statutory sentence of 29 years and the 20-year sentencing "cap" under the plea agreement. The court informed petitioner that "when you offer a plea of guilty to six counts in this information, you assume for those purposes that the Court will sentence you to twenty years." Gov't C.A. Br. 4 (quoting C.A. App. 58-59). Petitioner replied that he understood. *Ibid.* The district court also advised petitioner that, in its view, Section 3147 required mandatory consecutive sentences of not less than two years for each of Counts 3 through 6.[1] Petitioner's attorney disagreed,

---

[1] At the time of petitioner's offenses, 18 U.S.C. 3147 (Supp. II 1984), provided:

> A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—
>
> (1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or
>
> (2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.
>
> A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

The statute has been amended to eliminate the minimum enhancements. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 223(g), 98 Stat. 2028; Criminal Law and Procedure Tech-

contending that Section 3147 authorized the court to impose only a single consecutive sentence for all four offenses. The district court informed petitioner that, under the court's interpretation of Section 3147, petitioner could "forget about getting out in two years, or four years or six years or eight years." Pet. App. 3A (quoting Tr. 12). At the court's request, petitioner had a further discussion with his lawyer regarding his plea. Following that discussion, petitioner reaffirmed that he wanted to plead guilty. Pet. App. 2A-4A; Gov't C.A. Br. 5.

The district court sentenced petitioner to concurrent one-year terms of imprisonment on Counts 1 and 2, a consecutive two-year term on Count 3, and consecutive three-year terms on each of Counts 4-6. Thus, the court sentenced petitioner to a total of 12 years' imprisonment. The court also fined petitioner $411,000. Pet. App. 4A, 13A.

In November 1987, almost a year after he was sentenced, petitioner filed a motion under Fed. R. Crim. P. 35(a) to correct an illegal sentence.[2] Petitioner argued, among other things, that the district court had sentenced him on the erroneous assumption that it had no power to place him on probation for the violations of Section 3147. He also asserted that the district court had failed to advise him correctly of the mandatory minimum sentence under Section 3147. Finally, petitioner alleged that the district court had

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nical Amendments Act of 1986, Pub. L. No. 99-646, § 55(g), 100 Stat. 3610.

[2] The version of Rule 35 applicable to offenses committed prior to November 1, 1987, provided that a district court could correct an illegal sentence at any time, and could correct a sentence imposed in an illegal manner within 120 days after the sentence was imposed. Rule 35 was amended, effective November 1987, to provide that a sentence may be corrected only on remand from a court of appeals or for changed circumstances. See Pub. L. No. 98-473, § 215(b), 98 Stat. 2015-2016.

erred in imposing multiple consecutive sentences under Section 3147. Gov't C.A. Br. 5.

2. The district court denied the motion. The court rejected petitioner's contention that it had imposed a term of imprisonment on the mistaken assumption that it had no power to place him on probation. The court stated that petitioner's sentence was "not imposed solely in consideration of our interpretation of Section 3147 and the sanctions mandated by the statute." Pet. App. 10A. In addition, the court explained that, in accordance with the customary practice in the Eastern District of New York, it had submitted a tentative sentence to a sentencing advisory panel of two judges. The sentencing judge and one of the advisory judges had initially recommended 15 years' imprisonment and fines, and the other advisory judge had recommended 20 years' imprisonment and fines. Pet. App. 6A-7A, 13A. The district court stated that it had reconsidered petitioner's sentence "with the clear understanding that probation was a permissible alternative under Section 3147," and reaffirmed the sentence. *Id.* at 12A-13A.

The district court also rejected petitioner's contention that Section 3147 required the imposition of a single enhanced sentence for all four felonies committed while petitioner was released on bail. The court concluded that the "clear and unambiguous language of the statute contradicts [petitioner's] argument that Section 3147 requires the court to impose only one enhanced sentence." Pet. App. 12A.

3. The court of appeals summarily affirmed the district court's denial of petitioner's Rule 35 motion "for substantially the reasons set forth in [the district court's] opinion." Pet. App. 14A-15A.

ARGUMENT

1. Petitioner first contends (Pet. 13-19) that the district court improperly imposed prison sentences for the Section

3147 violations under the mistaken belief that it had no power to place petitioner on probation for those offenses. This contention is without merit. At the time of petitioner's sentencing, the district court was bound by *United States* v. *Rodriguez*, 794 F.2d 24 (2d Cir. 1986), which held that a sentencing court could not place a defendant on probation for an offense that was subject to enhanced punishment under Section 3147. In March 1987, about five months after petitioner was sentenced, this Court reversed the Second Circuit's decision in *Rodriguez*, holding that Section 3147 does not divest sentencing judges of their traditional power to impose probation for an offense. *Rodriguez* v. *United States*, 480 U.S. 522 (1987).

Petitioner's contention that he should "get [the] benefit" of this Court's decision in *Rodriguez* (Pet. 15) overlooks the fact that the district court had no intention of placing petitioner on probation. As the district court explained, both it and the advisory sentencing panel agreed that petitioner should receive a lengthy term of imprisonment for his offenses. In its opinion denying petitioner's motion to correct the sentence, the district court removed all possible doubt on this point by stating that it had "reconsidered the sentences imposed with the clear understanding that probation was a permissible alternative under [section] 3147," and reaffirmed them.[3] Pet. App. 12A-13A.

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[3] Petitioner's reliance (Pet. 16) on *United States* v. *Mudd*, 817 F.2d 840 (D.C. Cir. 1987), is misplaced. There, a sentence under Section 3147 was reversed because the sentencing court wanted to place the defendant on probation but erroneously believed that it lacked the power to do so. In *United States* v. *DiRusso*, 535 F.2d 673 (1st Cir. 1976), and *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985), the district court was misinformed about the possibility of parole and might have imposed a more lenient sentence if it had been correctly informed. Here, in contrast, petitioner was not prejudiced, because the district court never had any intention of placing him on probation and reaffirmed

2. Petitioner next contends (Pet. 19-20) that the district court violated Fed. R. Crim. P. 11(c)(1) by incorrectly advising him of the mandatory minimum penalty provided by law under Section 3147. As an initial matter, it is not clear that this issue was properly raised in petitioner's Rule 35 motion. The version of Rule 35 applicable in petitioner's case required that motions to correct a sentence imposed "in an illegal manner" must be made within 120 days of the imposition of sentence. Petitioner's motion was filed almost a year after his sentencing. In any event, the district court correctly advised petitioner that the mandatory minimum sentence under Section 3147 was two years. Pet. App. 2A-3A. Petitioner appears to assert that the district court should have advised him of its power to impose probation for his offenses, but probation under 18 U.S.C. 3651 (1982) simply is not a minimum "sentence" under Section 3147. See *Rodriguez*, 480 U.S. at 524 (distinguishing between sentence and execution of sentence).

Moreover, it is difficult to see how petitioner could have been prejudiced by an *overstatement* of the minimum penalty. The district court intended to sentence petitioner to a lengthy term of imprisonment; petitioner chose to plead guilty despite the court's statement that he should expect to be sentenced to a term of 20 years. The absence of prejudice is fatal to petitioner's claim. See *United States* v. *Timmreck*, 441 U.S. 780 (1979) (guilty plea not subject to collateral attack under 28 U.S.C. 2255 for failure to comply with the formal requirements of Rule 11 absent some showing of prejudice). Finally, the question whether the district court correctly advised petitioner of the mandatory minimum sentence under Section 3147 is of no continuing importance, because Section 3147 no longer prescribes a mandatory minimum sentence.

---

his sentence "with the clear understanding that probation was a permissible alternative." Pet. App. 13A-14A.

3. Petitioner's final contention (Pet. 20-27) is that "Section 3147 provides for a *single* enhancement to run consecutively to those sentences imposed for other offenses." Pet. 23. Petitioner asserts that, if the district court were required to impose only a single enhancement under Section 3147, he "would have received much less of a jail sentence." Pet. 27. In light of the initial sentencing recommendations of 15 to 20 years' imprisonment, and the court's statement that the sentence "was not imposed solely in consideration of our interpretation of Section 3147" (Pet. App. 10A), petitioner's assertion is untenable.

In addition, the district court's interpretation of the statute is reasonable and does not conflict with any decision of a court of appeals. Section 3147 states that "[a] person convicted of an offense" committed while the person is released on bail "shall be sentenced, in addition to the sentence prescribed for the offense," to an additional term of imprisonment. The statute further provides that "[a] term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment." The ordinary meaning of these words requires that a sentence imposed under Section 3147 must be consecutive to every other sentence imposed on the defendant. The structure of Section 3147 is consistent with its plain language. Section 3147 applies to "an offense committed" while the defendant is on release for another offense. If a defendant has committed multiple offenses while on release, Section 3147 applies to each and every such offense. Finally, imposing consecutive sentences for each violation of Section 3147 is consistent with the deterrent policy of the statute. If petitioner's interpretation of the statute were accepted, the deterrent effect of the mandatory minimum sentencing provision of Section 3147 would be significantly reduced as to any defendant who had already committed one crime while released on bail.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JULY 1990

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